IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION
WRIT PETITION NO.1879 OF 1993

Mrs. Laxmi Harish Sharma,
residing at Room No. 27, Birje
Bhavan, Gufa Road,
Jogeshwari (East),
Mumbai- 400 060. ...Petitioner.

V/s

1. Municipal Corporation of
Greater Bombay, having its
Office at Mahapalika Marg,
Bombay - 400001.

2. Adarsh Vidya Mandir Trust,
Laxman Nagar, Kurar Village,
Malad (East), Bombay 400097.

3. Lallan Rameshwar Singh,
Chairman, Adarsh Vidya Mandir Trust,
Laxmannagar, Kurar Village,
Malad (East), Bombay- 400097.

4. Adarsh Vidya Mandir High
School (Primary School) Laxman
Nagar, Kurar Village, Kurar
Village, Malad (E), Bombay
- 400 097. ...Respondents.

Mr. M.M. Vashi with Ms. Betty D'souza for the petitioner.

Mr. Vinod Mahadik for respondent No.1.

Mr. S.J. Panikar with Ms. Payal Fernandes for respondent Nos. 2 to 4

CORAM: R.M.S. KHANDEPARKAR &
V. M. KANADE, JJ.

DATE : 30th August, 2005.

ORAL JUDGMENT: (Per R.M.S. Khandeparkar, J.)

1. Heard. Perused the records.

2. The petitioner challenges the action of termination of her services as teacher in the Primary School being contrary to the provisions of law applicable to her and in arbitrary exercise of powers by the Management with the blessings of the concerned authority in the Corporation.

3. Few facts relevant for the decision are that the petitioner was appointed as a teacher in the Primary Section of respondent No.4 - School in the year 1990. The appointment of the petitioner as a teacher in the School was confirmed by the Management of respondent No.4 under certificate issued to the petitioner on 24/06/1993. However, by letter dated 21/07/1993, the petitioner was informed by respondent No.3 on behalf of respondent Nos. 2 and 4 that her services were terminated with effect from 31/07/1993 on account of reduction in the students' population in Standard-II. It appears that certain efforts were made on behalf of the petitioner to get herself reinstated and, in the process, the letter dated 13/08/1993 was issued confirming a Resolution having been passed by the Management of respondent Nos. 2 and 4 to the effect

that the petitioner be reinstated and she be paid with the balance payment of her salary. Further, under letter dated 11/09/1993, the Superintendent of the Schools Section of the Corporation directed the respondent Nos. 2 and 4 to reinstate the petitioner in service and to pay the balance of her salary at earliest possible and also that two Divisions of each of the Standards I to IV in the school in question could not be reduced. The compliance of the said direction was required to be reported to the Superintendent within three days. However, no steps were taken by the Management to reinstate the petitioner and hence the present Petition came to be filed. During the pendency of the Petition, a letter came to be issued by the Education Officer of the Corporation addressed to the Chairman of respondent Nos. 2 and 4 to the effect that the Management is fully competent to terminate any member of the teaching staff and that the petitioner had not filed any appeal to the Education Officer against the termination of her services in terms of rule 20 of Appendix-VII of the Grant-in Aid Code.

4. While assailing the action of termination of the services of the petitioner, the learned advocate appearing for the petitioner submitted that,

undisputedly, the action has been taken in terms of the powers under rule 22 of Appendix VII of the Grant-in Aid Code in the approved Private Primary Schools in the Greater Bombay. Being so, it was absolutely necessary for the Management to ensure that there was, in fact, considerable reduction in the number of divisions on account of fall in the students' population in Standard-II and that such reduction as well as termination of the services of the petitioner on that count being duly approved by the competent authority before issuance of order of termination. Having not done so, the termination of the services of the petitioner is absolutely illegal. He has further submitted that in case of termination of services in exercise of powers under Rule 22, there is no provision for appeal. Besides, such termination must be by giving three months' notice and this condition also has not been fulfilled. Attention was also drawn to rule 20 of the said Appendix-VII which provides for right to appeal only in case of termination of services on account of disciplinary action against the teacher. Reference was also made to rule 27 of Chapter-II of the said Code which deals with the provisions relating to the number of the pupils permissible in a particular Division and the changes thereof to be made only on approval by the

competent authority.

5. The learned advocate appearing for the Corporation has, referring to the affidavit filed by Shri Dashrath Ambuji Bharaskar, a Superintendent in the office of Respondent No.1, submitted that the termination was necessitated on account of reduction in the number of pupils and consequential reduction in the number of Divisions as described in Exhibit-1 annexed to the affidavit of the said Superintendent of the Corporation and, therefore, no fault can be found with the approval granted to the termination of the services of the petitioner as well as reduction in number of Divisions.

6. The learned advocate appearing for respondent Nos. 2 to 4 submitted that respondent No.3 has already expired on 26/09/1997. He further submitted that the affidavit-in-reply filed on behalf of the Management and on behalf of the Corporation obviously reveal that there was reduction in the number of pupils which justified reduction in number of Divisions and consequential reduction in the number of teaching staff. Such a reduction being permissible, the services of juniormost teacher were terminated in terms of rule 22. Drawing attention to the Chart of

teaching staff annexed to the affidavit-in-reply in relation to the School in question, it was submitted that the petitioner was the juniormost teacher amongst teaching staff of six members and therefore there was no option left to the Management but to terminate the services of the petitioner being a juniormost on account of reduction in the number of pupils and particularly in Standard-II. He has also submitted that the petitioner is not entitled for any relief in the absence of challenge to the order of termination of services and challenge being merely to the communication of such order. It is the contention of the learned advocate for the respondents - Management that the services of the petitioner were terminated by order dated 30/04/1993. It was merely communicated to the petitioner under letter dated 31/07/1993. In that connection, attention was drawn to para 2 of the affidavit which was filed on behalf of the respondent Nos. 2 and 4 along with the copy of the order dated 30/04/1993 annexed to the said Affidavit at Exhibit-B The contention of the learned advocate is that the said order was sought to be served upon the petitioner through Head Master Shri Mourya. However, the petitioner refused to accept the same.

7. A feeble attempt was also sought to be made on behalf of the respondents to raise the point about non-maintainability of the Writ Petition and non-availability of the relief in the form of writ against the respondents - Management, the same being a Private School and no writ can lie against the Private Institution. However, there is no substance in such objection as the law on that point is well settled consequent to the decision of the Apex Court in the case of Shri Anadi Mukta Sadguru Shree Muktajee Vandasjiswami Suvarna Jayanti Mahotsav Smarak Trust and others Vs. V.R. Rudani and others reported in **AIR 1989 SC 1607**. It was clearly ruled therein by the Apex Court that Article 226 confers power on the courts to issue writs for enforcement of the fundamental rights as well as non-fundamental rights. The expression "any person or authority" is not confined to statutory bodies or instrumentalities of the Government, but covers any other person or body performing public duty. And, the duty must be judged in the light of positive obligation owed by the person or authority to the affected party, no matter by what means the duty is imposed. If a positive obligation exists mandamus cannot be denied. Besides, in case of illegality committed by such Management in relation to the service conditions of a teacher in a School,

directions in the form of mandamus can be issued, once it is apparent that such Management is subject to the control of the Public Body like Education Officer of the Zilla Parishad or the Municipal Corporation. Being so, considering the facts of the case, since the service conditions of the teachers in 2nd respondent - School are clearly under the control of the competent authority of the Corporation in view of the provisions comprised under the Mumbai Municipal Corporation Act, 1888 read with the provisions of the said Code, there is no substance in the said objection regarding the maintainability of the Petition or absence of availability of relief in writ jurisdiction to the petitioner.

8. As regards the contention of the respondent - Management that there is no challenge to the order of termination dated 30/04/1993, it is to be noted that the records nowhere disclose communication of such order dated 30/04/1993 to the petitioner. Undoubtedly, the petitioner had made a categorical statement in the Petition itself in para 5 thereof that she was never served with the letter dated 30/04/1993 either by hand delivery or by registered post and the allegations regarding refusal to accept such letter were totally false. In the affidavit in

reply filed by respondent No.3, it has been stated that the Management being empowered to terminate the services under rule 22 of the said Code and applying the principle of seniority of last come first go, a notice dated 30/04/1993 was addressed to the petitioner to that effect. A copy of such letter alleged to have been addressed is also annexed as Exhibit-B to the affidavit. Undoubtedly, the said copy of the letter dated 30/04/1993 annexed to the affidavit discloses reference to the reduction in Class of Standard-II from June 1993 and further, on that count, the termination of the services of the petitioner as per rule 22 of the said Code. However, the fact remains that in-spite of the categorical statement on oath about non-receipt of any such letter dated 30/04/1993 by the petitioner at the time of filing of the petition itself, the respondents have not bothered to establish the actual service, if any, of such notice upon the petitioner. Apart from making claim that such letter was "addressed" to the petitioner, there is nothing placed on record to show that such letter was, in fact, sent or delivered to the petitioner. Undisputedly, copy of the letter annexed to the petition discloses that the said letter of 30/04/1993 was signed by the Head Master of the School. It is informed that at the relevant time one

Mr. Mourya was the Head Master. There is no affidavit of Mr. Mourya or the concerned Head Master of the School confirming that, in fact, such letter was communicated or served upon the petitioner. In other words, in the absence of any material on record about the communication and service of the letter dated 30/04/1993 upon the petitioner, the contention of the respondents that the petitioner was duty bound to challenge the said order and that the letter of 30/07/1993 was mere communication of the said order cannot be accepted. Once it is apparent that the petitioner was for the first time informed about termination of her services by the letter dated 31/07/1993, the petitioner was within her rights to challenge the said letter as being the letter communicating the decision of termination of her services. The objection regarding non-challenge to letter dated 30/04/1993 is therefore to be held as devoid of substance. In any case, the Petition relates to the grievance against the termination of her services in terms of provisions of rule 22 of the said Code. Merely because it refers to letter dated 31/07/1993 and not to the letter dated 30/04/1993 that will not entitle the respondents to non-suit the petitioner on that ground and that too without establishing communication of the order of 30/04/1993

to the petitioner. Apparently, the objection in that regard appears to be with the sole intention to non-suit the petitioner on technical ground and, on that count also, the contention in that regard needs to be rejected.

9. Undoubtedly, rule 22 of Appendix-VII of the Code provides that "In cases of reduction of establishment owing to the reduction in number of pupils, management may, terminate the services of a permanent teacher after giving 3 months' notice. In such cases the principle of seniority shall ordinarily be observed, but if for any special reason this principle is proposed to be departed from by the management they shall obtain the prior approval of the Department." Plain reading of the said rule would disclose that the same empowers the Management to terminate the services of surplus teachers on account of reduction in population of the pupils in the School. It specifically provides that in case of such termination the principle of seniority i.e. last come, first go has to be observed. But, in case, it is found necessary to depart from such principle, prior approval of the Department should be taken.

10. The contention of the petitioner is that, invariably, for the purpose of termination of services in exercise of power under rule 22, prior approval of the Department is necessary, whereas it is the contention of the respondents that rule 22 nowhere contemplates any such prior approval. In order to consider the rival contentions, in this matter, it would be necessary to take into consideration rule 27 of Chapter-II of the said Code.

11. The said Rule 27 relates to number of pupils to be admitted in different Classes and it provides that the maximum number of pupils in one Division shall be 40; and the room in which the class is to be held shall provide the requisite accommodation for the number of pupils actually admitted, at the rate, ordinarily, not less than 8 square feet per pupil on the rolls. It further provides that the maximum number of pupils in a division shall not be exceeded and the standard of accommodation specified therein should not be reduced without the prior sanction of the Department. Plain reading of the said rule would reveal that a School is empowered to admit maximum 40 students in one Division in a standard. Besides that, in the class room, there must be sufficient accommodation for the students and it should not be

less than 8 square feet per pupil on the rolls. The note to the said rule further clarifies that neither the maximum number of pupils in a Division nor the standard of accommodation should be reduced or changed without prior sanction of the Department.

12. Conjoint reading of rule 27 in Chapter-II along with rule 22 in Chapter-VII of the said Code would, at once, disclose that changes in the number of students in a Division or the reduction in the number of Divisions cannot be effected at the sweet will of the Management of the School. It has to depend upon actual changes in the number of pupils and the contention in that regard of the Management has to be ascertained to be genuine by the competent authority and to be approved by the Department prior to taking any final decision in that regard by the Management. The Management is not empowered to unilaterally decide about the number of students to be in a division and certainly not in contravention of rule 27, nor can decide about the decrease in the number of teaching staff without prior approval in that regard by the Department. Though the rule 22 does not specifically speak of prior approval for termination of services of the teachers, it is pertinent to note that the power to be exercised under the rule 22 is subjected to the

provisions of law comprised under the said rule 27 is abundantly clear from the fact that for any sort of changes in the divisions including the number of students therein for whatsoever reason is subject to the prior approval of the competent authority under the said rule No.27. Without proper compliance of the provisions of rule 27 there cannot be occasion for change in number of divisions or for reduction in number thereof and, therefore, there cannot be any occasion for exercise of powers under rule 22 without prior approval of the competent authority.

13. It is also to be borne in mind that the teachers in a School are for the benefit of the students. The provisions comprised under rule 27 are also in the best interest of the students. The management of educational institution with the approval of the competent authority is expected thereby to ensure healthy environment and conducive atmosphere which would facilitate the teachers in imparting the education to the students and for the latters to acquire the same. Such provisions of law are to be complied with bearing in mind the best interest of the students and not at the whims and fancies of the management or at the sweet will of the authorities concerned.

14. It was sought to be argued on behalf of the respondents that the petitioner could have availed the remedy of appeal available under rule 20 of Appendix-VII. Rule 20 of the said Appendix-VII of the said Code entitles teachers to file an appeal to the Education Officer, Primary Education Department against the order of termination of service under rule 15 and rule 18. It does not provide for any appeal against the termination of service in exercise of powers under rule 22. The rule 20 being very clear about the maintainability of appeal only against the orders passed in disciplinary proceedings under rules 15 and 18 and not being under rule 22, the question of the petitioner availing any remedy of appeal as such against the order of termination of her services under rule 22 does not arise.

15. However, nonavailability of the remedy of appeal against the decision in exercise of powers under rule 22 itself makes it clear that such exercise of power has to be subject to the scrutiny of the department to ascertain whether such order has been passed bonafide and that there is no arbitrary exercise of powers by the Management in that regard. In fact, non-availability of the appellate remedy is all the

more reason for subjecting the order of Management to the scrutiny of the department prior to giving effect to the termination of the services of the teachers on the ground of reduction of the students' population or reduction in the divisions in the School. Merely because rule 22 specifically refers to necessity of prior approval in case of departure from following the principle of seniority while terminating the services of a teacher in exercise of powers under rule 22 that by itself would not mean that no such approval or sanction of the department is necessary, otherwise than when the principle of seniority is not followed. As already observed above, rule 22 has necessarily to be read along with the other provisions of the Code and particularly rule 27 of Chapter II.

16. It is pertinent to note that the petitioner in the petition has categorically stated that originally there were two Divisions in the IInd Standard and the respondent - Management had reduced the same to one division of 87 students. The affidavit-in-reply filed on behalf of the Corporation also confirms this fact. In fact, the Chart showing the reduction of the students' population reveal that in the year 1991-92 there were two divisions in the IInd Standard having total number of 100 students. In 1992-93, there were

two Divisions having total number of 103 students in IInd Standard, whereas in 1993-94, the division of IInd Standard was reduced to one having total students' population of 76 in the said class. The rule 27 quoted above clearly prescribes the maximum number of students in a division can be 40 and there cannot be any change in that situation without prior approval of the department. In this regard, the respondent - Corporation has also placed on record the so-called approval for reduction in the divisions in the IInd Standard. In that regard, an order passed on 21st July 1993 read thus:-

> "This office has No Objection to reduce the No. of divisions of Std. IInd if the natural decrease in No. of students."

Obviously, it discloses total non-application of mind and arbitrary exercise of powers in defiance of rule 27 of Chapter-II of the said Code. As already stated above, rule 27 specifically prescribes that there should not be any change in the number of students in a division as well as in the standard of accommodation specified in the said rule without prior sanction of the department. The standard of accommodation which is prescribed is minimum 8 square feet per pupil on

the rolls. The rule 27 has been obviously prescribed taking into consideration the requirement of proper, healthy and conducive environment in the class-rooms in the best interest of the students Bearing the same in mind, the authorities cannot assume that the sanction for reduction in number of students or the change in the standard of accommodation can be granted as a matter of course or at the sweet will either of the Management or of the authorities. Any such change will have to be justified with appropriate order disclosing the application of mind, and adherence to the requirements of law in that regard. Merely because the Management desires to reduce the number of divisions on account of some fall in the students' population in a standard, that cannot justify reduction in the number of divisions. Even rule 22 of Appendix-VII clearly speaks of "a considerable fall in the number of pupils". Being so, the order regarding approval of reduction in the number of divisions cannot be on assumption that there is a natural decrease in the students. Even assuming that there is a natural decrease in the students, that itself would not justify any decrease in divisions. The authority will have to ascertain bearing in mind the maximum number of 40 prescribed under rule 27 in one division and considering the area of the class room as to how

many more students can be accommodated in a particular division. The crowding of students in one class can affect the environment adversely and prejudicially affect the students. In fact, the students need to have healthy atmosphere in the class-rooms. All these aspects are necessarily to be ascertained before granting any such sanction by the concerned authority. The Order dated 21/07/1993 nowhere discloses any such consideration by the respondents before the grant of permission to reduce the number of divisions.

17. The materials on record, therefore, nowhere disclose that there was a genuine reason and justification for reduction in the divisions in IInd Standard in the year 1992-93 nor the authorities having considered the genuineness of the claim of the Management in that regard nor there was any prior approval for any such reduction in the number of divisions in the IInd Standard. Similarly, the materials on record nowhere disclose that the termination of services of the petitioner was by giving three months' prior notice to the petitioner. On the contrary, there is a clear admission as regards non-service of such notice upon the petitioner. The materials on record also do not disclose approval for such termination of the service of the petitioner by

the department or the competent authority. There is clear violation of the provisions of rule 22 of Appendix-VII read with rule 27 of Appendix-II of the said Code, not only by Management but even by the authorities of the Corporation.

18. Undisputedly, the affidavit on behalf of the Corporation has been filed by the Superintendent of the Corporation. In the affidavit, deponent has stated that "I say that as per Appendix-7, the petitioner had to file an appeal against the order of termination, which the petitioner had not done so as it is required to do so within 15 days from the date of actual receipt of the termination order." As already seen above, rule 22 of Appendix-VII nowhere applies to the cases where the services of the teacher are terminated in exercise of powers under rule 22 thereof. There is no provision of appeal against the order of termination in exercise of powers under rule 22. The deponent is stated to be a person conversant with the facts of the case as well as the provisions of law applicable thereto. The narration of various facts in the affidavit apparently disclose his knowledge about the facts. A specific averment about the availability of appeal under rule 22 also discloses total misreading of rule 22 by the

deponent.

19. Rule 20 of Appendix-VII reads thus:-

> "20. The teacher shall be free to make an appeal to the Education Officer, Primary Education Department, against the order of termination of service, under Rules 15 and 18 above, provided it is filed within 15 days of the actual receipt or refusal to receive the copy of the order of termination of service. The Education Officer will cause such enquiry as he may consider necessary to be made and will give his decision in the matter. It shall however, be open to the party or parties concerned to make a further appeal to the Municipal Commissioner whose decision shall be final."

Plain reading of rule 20, as stated above, discloses that the remedy of the appeal is available only in cases of termination of services in disciplinary proceedings when the order is passed in that regard under rules 15 and 18. When the rule 20 specifically refers to orders under rules 15 and 18, it is not understood as to how the deponent could make a

statement in his affidavit that the petitioner could have filed an appeal under rule 20, knowing well that the services of the petitioner were not terminated in disciplinary proceedings but were terminated in exercise of powers under rule 22 which relates to the occasion for termination of service on account of reduction in number of population of the pupils. The deponent, in this case, is an employee of the Corporation claiming to be dealing with the educational matters relating to the schools which come under the jurisdiction of the Corporation. We have to record our displeasure regarding the attempt on the part of the Officer of the Corporation to mislead the Court by making a statement that the petitioner could have filed appeal under rule 20, when in fact, no such appeal lies in case of order under rule 22 of the Code. It is always to be borne in mind particularly by the Officers of the Government and Public Bodies that affidavits are required to be filed essentially in relation to the facts. The points of law are to be argued in the course of the hearing of the matter. The affidavits should necessarily disclose the factual foundation which could support the arguments to be advanced in support of the case of the party.

20. For the reasons stated above, therefore, Petition succeeds. The impugned order of termination of services of the petitioner is hereby quashed and set aside. The respondents are directed to ensure the reinstatement of the petitioner from the date on which she was sought to be terminated with consequential benefits. As far as back wages are concerned, it will be the liability of the respondents to pay 50% thereof from the date the petitioner was sought to be terminated till this date. However, the same shall be paid to the petitioner within a period of six weeks from today primarily by the Corporation to be recovered from the Management as well as its Officers, if any, liable, after fixing the liability in that regard.

21. The learned Counsel for respondent Nos. 2 and 4 prays for stay of the order. In the facts and circumstances of the case, we do not find any justification for grant of stay. Prayer for stay is rejected.

(R.M.S. KHANDEPARKAR, J.)

(V.M. KANADE, J.)